



Entered on Docket
January 25, 2006

Hon. Bruce A. Markell
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

ASTON-NEVADA LIMITED
PARTNERSHIP,

Debtor.

Case No.: BK-S-04-18335-BAM
Chapter 11

Date: June 17, 2005
Time: 9:30 a.m.

OPINION REGARDING SANCTIONS

This matter is before the court on an order to show cause as to why the law firm of Harris Merritt Chapman, Ltd. (HMC) and one of its partners, Scott E. Chapman, should not be sanctioned for their actions in this case. After extensive briefing and one-half day of testimony, the court concludes that the lawyers' conduct in this case was aggressively reckless as well as being suffused with bad faith. The court therefore orders sanctions as set forth below.

I. Summary of Case

Aston-Nevada Limited Partnership, the debtor in this case, had one asset: a 1999 Porsche 911. The ultimate owner of Aston-Nevada, Kerry Rogers, drove this

1 Porsche.¹ Rogers owed money to Silver State Bank (SSB), and had used his control of
2 Aston-Nevada to cause it to give SSB a security interest in the Porsche to secure
3 Rogers' personal debt.

4 After much wrangling between SSB and Rogers over Rogers' repayment of
5 his debt to SSB, the bank filed a lawsuit in state court against Rogers and Aston-
6 Nevada. In an effort to force Rogers and Aston-Nevada to surrender the Porsche to
7 SSB, SSB had scheduled a hearing for that purpose for Monday, August 2, 2004. On
8 July 30, 2004, the Friday before the state court hearing, Rogers caused Aston-Nevada
9 to file a chapter 11 petition, essentially staying the Monday hearing in state court.
10 Rogers signed the bankruptcy petition on behalf of Aston-Nevada. He did so without
11 the assistance of counsel, but with the help of Phillip LeVillier.²

12 Rogers listed SSB as Aston-Nevada's sole creditor on its required list of
13 creditors. SSB immediately moved to lift the automatic stay in order to continue its
14 collection action. Rogers then hired HMC, through Chapman, to represent Aston-
15 Nevada.³

18 ¹Aston-Nevada's sole general partner is an entity called Gortek, LLC. Rogers is the manager
19 of Gortek and apparently owns all of its outstanding interests.

20 ²LeVillier is a lawyer who signed Aston-Nevada's petition as a bankruptcy petition preparer.
21 He is not licensed in Nevada.

22 ³After this retention, Rogers and LeVillier also retained HMC, and Chapman was the primary
23 lawyer representing their interests. In discussing the events set forth in text and in discussing the
24 responsibility for them, this opinion uses HMC's and Chapman's names interchangeably, because
25 Chapman acted as HMC's agent throughout, and HMC has not repudiated any of his actions.
Considering both parties as one for sanctions purposes is consistent with the manner in Rule 9011
apportions the responsibility for sanctionable activity. FED. R. BANK. P. 9011(c)(1)(A) (last sentence).

1 At the relief from stay hearing, this court found that the debtor had only one
2 asset and that the debtor had no equity in that asset. After reviewing the
3 circumstances that led to Aston-Nevada's filing, the court also found that Aston-
4 Nevada had filed its chapter 11 case in bad faith. The stay was lifted, and Aston-
5 Nevada did not appeal that ruling.

6 Given the pendency of the state court action, this court, however, declined
7 SSB's request to order Aston-Nevada to turn over the car. The bank then requested
8 an order under Bankruptcy Rule 2004 to examine Aston-Nevada's "person most
9 knowledgeable" in order to locate the car and to ensure that it was insured. The court
10 entered an order authorizing such an examination. Represented by Chapman,
11 LeVillier – but not Rogers – then appeared at the examination. Neither of them,
12 however, possessed or gave any relevant information about the car.

13 In the meantime, Chapman had tried to dismiss Aston-Nevada's bankruptcy
14 case without notice or a hearing. Almost a month after filing the first application to
15 dismiss, Chapman filed and served a more extensive motion to dismiss. That motion
16 was granted on October 7, 2004, subject to the resolution of a sanctions motion that
17 had been brought in the interim by SSB against Aston-Nevada, Rogers, and LeVillier
18 (but not Chapman or HMC).

19 The sanctions motion was hard fought. Chapman and HMC defended the
20 propriety of Aston-Nevada's original filing, in part by adopting Rogers' theory that
21 SSB was engaged in a conspiracy to take the Porsche for less than its fair value.
22 Chapman also advanced a theory that the chapter 11 had been filed to obtain the
23 intervention of a neutral chapter 11 trustee, although he never took any action to have
24 such a trustee appointed.

1 This court granted the sanctions motion on March 21, 2005. The order
2 required Aston-Nevada, Rogers, and LeVillier to pay SSB \$12,108.50 as sanctions. This
3 amount represented SSB's additional costs resulting from Aston-Nevada's chapter 11
4 filing. That ruling has not been appealed, and this Court does not know whether the
5 sanctions have been paid.

6 During the consideration of SSB's sanctions motion, however, the court
7 became concerned with the actions of HMC and Chapman. As a result, when it
8 entered the order imposing sanctions on the principals, the court entered a separate
9 order to show cause as to why HMC and Chapman should not also be sanctioned
10 under either Bankruptcy Rule 9011 or the court's inherent power to regulate practice
11 before it. The order referred to the memorandum opinion regarding sanctions and the
12 issues it raised. The order also contained a briefing schedule, which resulted in
13 significant filings and a half-day hearing on June 17, 2005. At the hearing, one
14 character witness for HMC testified,⁴ as did two of HMC's partners. The court then
15 took the matter under submission.

16 **II. The Details: HMC's and Chapman's Role**

17 A. *Retention*

18 According to Chapman, he first met with Rogers on August 19 or 20, 2004,
19 less than a week before the August 24 relief from stay hearing. By that time, Aston-
20 Nevada had filed schedules that indicated that it had only one asset – the Porsche.

21
22 ⁴HMC attempted to have the witness qualified as an expert in bankruptcy litigation, but upon
23 *voir dire* the court learned that he had appeared in only about twenty bankruptcies in a thirty-year
24 career. The witness was thus unable to testify as an expert as to the level or quality of practice in
25 bankruptcy court. The court did, however, permit him to testify as to the reputation of Chapman and
the other lawyers of HMC, as he had previously employed some of HMC's lawyers.

1 The meeting lasted a little over an hour. Chapman’s testimony at the June hearing on
2 this matter was vague as to what specific matters were discussed, but he apparently
3 received what he thought was sufficient information to formulate an opposition.⁵

4 *B. Relief From Stay Response*

5 Chapman filed Aston-Nevada’s opposition to the relief from stay motion on
6 Monday, August 23. The opposition focused primarily on SSB’s alleged
7 noncompliance with local rules requiring parties to meet and attempt to settle such
8 motions before they are filed,⁶ indicating that Chapman had at least discussed the
9 history of the case with Rogers and had inquired about the communications between
10 Rogers and SSB.⁷ Based upon this history, the opposition asserted that SSB “has made
11 an affirmative effort to circumvent the rules and provisions of the bankruptcy code
12 and the local rules,” presumably a reference to the local rules regarding settlement
13 discussion before filing a motion seeking relief from the automatic stay. In support
14 of this assertion, HMC attached correspondence between Rogers and SSB under which
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16

17 ⁵In a separate disclosure, HMC revealed that Chapman also had Rogers sign a retainer
18 agreement under which, among other things, HMC agreed “to prepare motions pursuant to 11 U.S.C.
19 522(f)(2)(A) for avoidance of liens on household goods on behalf of Aston-Nevada.” This clause is
20 puzzling; Aston-Nevada, as a limited partnership, could not have brought a lien avoidance action
under Section 522(f) since non-individual debtors cannot claim exemptions, 11 U.S.C. § 522(b).

21 ⁶Local Bankruptcy Rule 4001(a)(5) for the District of Nevada requests the moving party on
22 a relief from stay motion to attempt to confer with debtor’s counsel at least two business days before
filing its motion and to make a sincere effort to settle.

23 ⁷In response to the initial sanctions motion, Chapman filed papers in which Rogers asserted
24 that counsel for SSB was not professional and had engaged in a vendetta against him. The court
25 previously found that these statements were not believable.

1 Rogers refused to turn over the Porsche except on Rogers' terms – correspondence
2 that Chapman and HMC could have obtained only from Rogers.

3 The opposition also resisted relief on substantive grounds. HMC's pleading
4 affirmatively stated that Aston-Nevada's filing was made "to effectuate the intent of
5 chapter 11" by allowing Aston-Nevada "to negotiate and resolve debts with creditors
6 and provide the debtor with the ability to reorganize its debts as well as its assets."
7 The opposition also disputed SSB's valuation of the Porsche, although its proffered
8 counter-valuation still left Aston-Nevada with no equity in the vehicle.⁸ While HMC
9 did not concede that the Porsche was the only asset of the estate, it did state that
10 "[a]llowing Silver State Bank to possess this vehicle or lift stay to pursue this vehicle
11 would not effectuate a reorganization in this case."⁹

12 At the relief from stay hearing, Chapman requested a continuance, which
13 was denied. On the merits, the court found that Aston-Nevada had but one asset and
14 but one creditor, and that it had no equity in that one asset. It also found that Aston-
15 Nevada's bankruptcy case had been commenced in bad faith. Relief from stay was
16 granted. Aston-Nevada did not appeal from this order.

20 ⁸The relief from stay motion asserted a secured debt in excess of \$55,750. Not only did Aston-
21 Nevada not contest SSB's secured status, it did not contest the amount of the debt. It did contest the
22 value of the car, but the highest value it placed on the Porsche was \$46,525, an amount some \$9,225
below SSB's secured debt, leaving no equity whatsoever for Aston-Nevada.

23 ⁹All of this information apparently came directly from Rogers. At the June 2005 hearing,
24 Chapman testified that before filing the opposition, he did not check the docket for Aston-Nevada's
25 case, nor did he review its petition or schedules.

1 C. *Misguided Application to Dismiss*

2 The day after the court granted SSB’s relief from stay motion, Chapman filed
3 an “application” to dismiss the case. He did not, however, serve the application on
4 SSB¹⁰ and he did not obtain a hearing date on the motion, as required by Local
5 Bankruptcy Rule 9014(b)(1). The application was fatally flawed and contained
6 numerous nonsensical references. Despite Aston-Nevada’s status as a limited
7 partnership in chapter 11, HMC’s pleading stated that the debtor was “qualified to
8 request dismissal of this case under § 707(b) [*sic*] of the United States Bankruptcy
9 Code, in that I [*sic*] no longer need the protection of this Court.” The application also
10 sought dismissal “without prejudice.”¹¹

11 D. *The Rule 2004 Examination*

12 On August 27, 2004, after receiving relief from stay, SSB requested and
13 received an order under Bankruptcy Rule 2004 allowing it to take an examination of
14 the “person most knowledgeable” at Aston-Nevada regarding the location and status
15 of the Porsche. The order indicated that the examination would be broad, and further
16 required production of documents “relating to the 1999 Porsche . . . including, but not
17 limited to, registration papers, insurance, location, etc.” That examination was held
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19 ¹⁰Or at least HMC never filed a certificate of service with respect to the application. SSB
20 learned of it, and on September 17 it filed an opposition based on Aston-Nevada’s failure to seek
21 dismissal through a noticed motion.

22 ¹¹It is unclear what such a phrase means in the context of a bankruptcy petition, but in regular
23 civil litigation the addition of “without prejudice” to an order of dismissal allows a plaintiff to later
24 file a complaint containing the same allegations as the dismissed complaint without running afoul
25 of claim or issue preclusion. Chapman’s addition of the phrase to the application was an attempt to
evade the court’s previous finding of bad faith, and to allow Aston-Nevada another opportunity to
file a bankruptcy case.

1 on Thursday, September 16, 2004, after one postponement to accommodate Rogers'
2 schedule.

3 At best, the examination was a farce. Rogers did not appear, for reasons
4 never adequately explained.¹² LeVillier appeared instead. HMC, through Chapman,
5 represented him and Aston-Nevada. Although LeVillier had knowledge of some of
6 Aston-Nevada's past activities, his most recent contact with Aston-Nevada had been
7 in 2003, more than a year before its bankruptcy filing.¹³ LeVillier acknowledged that
8 Aston-Nevada's only asset was the Porsche, but he then testified that he did not know
9 where the Porsche was or whether it was registered or insured. His only relevant
10 testimony about the Porsche was that he had seen Rogers driving it the day before.¹⁴

11 _____
12 ¹²His principal explanation, which appeared in paragraph 56 of his declaration in opposition
13 to sanctions, was that "other business prevented me from attending."

14 ¹³In response to the question "What do you do for Aston-Nevada?," LeVillier's response was
15 "Nothing." When asked, "What was the purpose of filing the Chapter 11 bankruptcy case?," his
16 response was, "I don't know." When asked, "Did you know that I was going to ask about the
17 Porsche today?," LeVillier responded, "Yes, sure." But to the follow-up question, "And you have
18 no knowledge of the Porsche, where it's located, do you?," he responded, "No."

19 ¹⁴The maddening nature of the examination is exemplified by the following:

20 Q: You're obviously not the person most knowledgeable because you don't have any
21 information about anything. You can tell me there's a car, I know that. Is there
22 anything else you can tell me?

23 A: There's a car, it's here, he has it.

24 Q: [You d]on't know if it's registered currently; is that correct?

25 A: No, I don't.

(continued...)

1 E. *Filing the Motion to Dismiss*

2 By September 20, 2004, Chapman and HMC realized that their application
3 to dismiss was ineffective. On that date, they filed a motion to dismiss, which was
4 properly served. This motion principally relied on the assertion that Aston-Nevada
5 had never received a chance to reorganize because of the quickness with which SSB's
6 relief from stay motion had been granted. In making this case, the pleading
7 incorporated many of the same statements used in the opposition to the motion for
8 relief from stay. In particular, the pleading reiterated the false statements that Aston-
9 Nevada had "assets" and "creditors," and that its filing had been made by Rogers to
10 allow Aston-Nevada time to negotiate with these "creditors."

11 In a somewhat contradictory fashion, HMC and Chapman then conceded
12 that "after exhaustive investigation," Aston-Nevada possessed only one asset, the
13 Porsche, even though the court had already made such a finding almost a month
14 earlier. HMC's papers also stated that "the Debtor cannot really effectuate a plan with
15 only one asset and one creditor."

16 Nevertheless, HMC and Chapman continued their efforts to cast SSB as the
17 villain, by attaching correspondence between the parties indicating that SSB was not
18 inclined to negotiate, and wanted payment in full or the car. A conspiracy against

19 ¹⁴(...continued)

20 Q: Do you know if it's insured?

21 A: No, I can't testify to that, no.

22 Q: Do you know if there's any body damage, if it's in poor condition or good condition?

23 A: It looked fine when I saw it [yesterday]. It looked like it had been freshly washed.
24 Pretty car. It's one that definitely catches your eye if you like cars.
25

1 Rogers was proffered as Aston-Nevada’s motivating reason for filing its bankruptcy
2 filing.¹⁵

3 *F. Response to SSB’s Motion for Sanctions*

4 SSB agreed that the case should be dismissed. Before dismissal, however,
5 it requested sanctions under Rule 9011 against Aston-Nevada, LeVillier, and Rogers
6 (but not HMC or Chapman), and it further requested that the court retain jurisdiction
7 to hear the sanctions motions if the case were later dismissed.

8 HMC, through Chapman, strenuously objected to the sanctions. In their
9 opposition, they again put forward Rogers’ conspiracy theory, and they also again put
10 forward the theory that since relief from stay had been granted, there was no need for
11 sanctions since SSB had received what it wanted. They defended their conduct and
12 the conduct of their clients at the Rule 2004 examination, essentially contending that
13 the client had the exclusive call as to who was the “person most knowledgeable,” and
14 that LeVillier had met that description.

15 After deliberation, the court found Rogers, LeVillier, and Aston-Nevada
16 liable for sanctions under Rule 9011 and under the court’s inherent powers. In
17 particular, the court noted that Aston-Nevada’s filing was a classic example of a bad
18 faith filing, and that the conduct in selecting and presenting LeVillier as the “person
19 most knowledgeable” was a separate example of bad faith. Rogers’ conspiracy theory
20 was completely discounted. The court imposed monetary sanctions of \$12,108.50, the
21 amount of SSB’s attorneys’ fees and costs.

22
23 ¹⁵The court completely dismissed this theory. For it to be believed, this court would have had
24 to have found that a state court judge had knowingly conspired with SSB to transfer the Porsche to
25 SSB for less than fair market value (and in violation of Article 9 of the UNIFORM COMMERCIAL CODE)
so that the winner of an SSB employee “lottery” could drive the car as his or her personal vehicle.

1 The court’s memorandum, however, went further and questioned HMC’s
2 and Chapman’s role in the sanctionable conduct. The memorandum expressed the
3 court’s reasoning as to why HMC and Chapman might also be sanctioned. Acting
4 under Rule 9011(c)(1)(B), the court then entered a separate order to show cause as to
5 why HMC and Chapman ought not to be sanctioned as well. The order gave HMC
6 and Chapman thirty days to respond.¹⁶

7 *G. Response to Court’s Order to Show Cause*

8 To say that HMC’s and Chapman’s response was one of outrage would be
9 an understatement. Their joint response, filed April 29, 2005, described the language
10 in the court’s prior memorandum as “outlandish, improper, unfounded and boorish”
11 as well as “false” and “reckless.” The court’s reasoning was based, HMC asserted, “on
12 flimsy threads of inference and guess-work,” and it exceeded the “reason and
13 decorum expected of a judicial officer.” For good measure, HMC stated that the prior
14 memorandum was “offensive, distasteful, crude, untrue, and should never [have
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19 ¹⁶The court also required HMC to disclose all compensation paid to it related to the
20 representation of Aston-Nevada, regardless of the sources, as HMC had not sought to be employed
21 by the chapter 11 estate, and had not filed any information required by Rule 2016.

22 HMC’s and Chapman’s time to respond was extended because the court’s docket and files
23 contained out-dated information regarding HMC’s address, thus causing the original order to show
24 cause to be misdelivered. When the error was brought to the court’s attention, the court extended
25 the time within which HMC and Chapman had to respond to ensure that they each received at least
30 days to respond. This apparently ended the matter; the error in noticing was not raised as a
defense at the June 2005 hearing.

1 been] issued by any judiciary or judicial officer administering equity and justice . . .”¹⁷

2 There were other similar bellicose phrases.¹⁸

3 And there were even threats. HMC and Chapman cited 42 U.S.C. § 1983 in
4 their brief, and stated that “the order of the Court that Respondents defend
5 themselves is unconstitutional at best.” In this regard, HMC asserted that the court
6 “stepped outside of the ‘judicial capacity’ when it began to opine to such a degrading
7 degree, without factual basis, and threatened Respondents with humiliation,
8 degradation and monetary deprivation. . . . Any damage Respondents sustain as a
9 result of this personal opinion, inside or outside judicial capacity, may spur action for
10 recovery.” HMC then dropped a footnote: “Investigation may even be entertained
11 regarding judicial proceedings for ethical violations of judicial responsibilities for
12 violations of such basic rules and constitutional rights.”¹⁹

13 _____
14 ¹⁷The quotation continues “without FIRST allowing a party to present itself before the tribunal
15 and admit evidence and argument.” HMC clearly misconstrued the memorandum as a final order,
16 which was demonstrably wrong – the memorandum gave HMC thirty days to present its case, and
17 held out the possibility that HMC could have a hearing on the issues depending on what its response
18 indicated. Such a hearing was held, as is set forth below.

19 ¹⁸The court’s memorandum was also described as “very scathing, accusatory, variably based
20 [sic] and soft-footed,” and as containing “heinous, outlandish and mendacious arguments,
21 allegations, implications and inferences.” HMC concluded its response with this sentence: “This
22 Court has demonstrated extreme disdain, rude and baseless accusations and possessed such intense
23 disgust for Respondents, unrivaled in any of my known colleagues’ practice of law.” It stated that
24 its representation of Aston-Nevada, Rogers, and LeVillier was “worthy of commendation and not
25 reprimand.”

¹⁹HMC also indicated that any monetary sanctions would be devastating to their firm. As
Kurt Harris, the managing partner, stated in his declaration signed under penalty of perjury: “That
the court is additionally intent upon leveling some form of monetary punishment which will operate
to remove food from my children’s mouths as well as the children of my partners.” Upon

(continued...)

1 In addition to their written brief, HMC and Chapman were given the entire
2 day of June 17, 2005, to introduce any additional evidence and testimony they desired.
3 In this regard, they introduced the testimony of a former employer, and the testimony
4 of two of the three partners in the firm, Kurt Harris and Scott Chapman. In stark
5 contrast to the strident tone of their brief, the members of HMC appeared almost
6 meek, in part because they appeared to believe that the court had already decided
7 against them.²⁰ At the conclusion of the hearing, in order to permit Chapman or HMC
8 to retract any of their statements or pleadings, the court asked the members of HMC
9 and Chapman, "Is there anything else that you wish to add or subtract from the
10 record?" The response, from Scott Chapman, on his behalf and on behalf of HMC,
11 "Not that I can think of, your Honor."

12 **III. HMC's and Chapman's Errors of Professional Responsibility**

13 The above is a long, albeit necessary, examination of the conduct of HMC
14 and Chapman in this case. It is not a history that brings honor to the legal profession.
15 It is a history, however, that presents at least two possible types of errors that could
16 form the basis of sanctions: errors caused by representing a client whose case
17 presented issues demonstrably beyond the capacity of the lawyers involved, and
18 errors caused by crossing the line between zealous advocacy and bad-faith practice.
19

20 ¹⁹(...continued)
21 questioning at the June hearing, Harris testified that the partners of HMC earned approximately
22 \$140,000 each in 2004, and thus the statement appears to be somewhat overblown.

23 ²⁰Harris testified that at least one of his inappropriate statements – that the court was taking
24 food out of the mouths of the children of HMC's partners – was animated by the belief that sanctions
25 were a foregone conclusion. He testified, "I don't feel as though anything that I say here today is
going to change the mind of the Court with regard to this."

1 A. *Errors Caused by Inexperience*

2 HMC's and Chapman's actions might be explained (but not justified) by
3 Chapman's relative inexperience. He testified that neither he nor anyone at HMC had
4 ever represented a chapter 11 debtor. As indicated above, he apparently didn't ask
5 the questions that he should have when performing client intake. He failed to follow
6 local rules regarding the need to obtain a hearing date.²¹ Although he testified that
7 HMC had access to PACER, the court's electronic docket, he never consulted it. He
8 never filed the necessary papers for HMC to be employed by Aston-Nevada and never
9 filed any of the necessary financial disclosures. All of this could be read as improper
10 actions taken in good faith by an inept and inexperienced litigator, out of his element
11 in bankruptcy court.

12 B. *Errors Caused by Inappropriate Practice*

13 The court, however, does not view Chapman's (and derivatively, HMC's)
14 actions in such a benign light. At the initial relief from stay hearing, Chapman knew
15 enough to argue that SSB had violated the local rules regarding meeting and
16 conferring about relief, and he had paperwork to back up the claim – paperwork that
17 disclosed that Aston-Nevada had filed its bankruptcy to evade state court
18 proceedings. He admitted that he had met with Rogers for about an hour before filing
19 any pleadings. Yet, despite also admitting that HMC had access to PACER, he never
20 consulted it to see what Aston-Nevada had filed. In short, Chapman took the
21 information that he thought would give him a tactical advantage, and he turned a
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23 ²¹In addition to the initial application to dismiss, Chapman neglected to obtain a hearing date
24 on HMC's post-sanctions motion to withdraw from representing Aston-Nevada, Rogers, and
25 LeVillier.

1 blind eye to sources that could have supplemented and corrected positions he later
2 took.

3 Chapman asserts that filing the initial application to dismiss also shows a
4 lack of improper motive. Yet the initial application was so clumsily drawn, and so
5 ineptly pursued, that it raises at least two issues of good faith. The first is the obvious
6 issue of recklessness in engaging in a practice for which the attorney was woefully
7 unprepared. The second, and the one the court credits, is that the application was an
8 inelegant attempt to install an escape hatch in their representation, giving HMC an
9 excuse (which it has raised in these proceedings) that it was seeking to do the “right
10 thing” despite Rogers’ instructions. The fact that the application was never served or
11 prosecuted lends support to this theory, as does the fact that it was so inept – it could
12 easily be explained away as a mistake if Rogers’ position later required HMC to
13 disavow it. This reading of the evidence is also supported by the fact that Chapman
14 sought dismissal “without prejudice” – whatever that may mean in the context of a
15 bankruptcy case – despite the finding the court had made the day before that Aston-
16 Nevada’s filing was in bad faith.

17 HMC’s and Chapman’s conduct with respect to the Rule 2004 examination
18 further supports the conclusion that HMC’s and Chapman’s actions were in bad faith.
19 When SSB obtained an order requiring Aston-Nevada’s “person most knowledgeable”
20 to appear for an examination under Bankruptcy Rule 2004,²² HMC pursued a course
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23 ²²SSB obviously did not dream up the term “person most knowledgeable.” It is the standard
24 designation under Rule 30(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE or Bankruptcy Rule 7026
25 for the appropriate person to testify on behalf of a party who is not an individual. *See* Mattel, Inc.
v. Walking Mountain Prod., 353 F.3d 792, 798 n.4 (9th Cir. 2003).

1 of action that was, at best, inconsistent with their now-stated aim of dismissal, and, at
2 worst, an attempt to openly flout the order regarding the Rule 2004 examination.

3 The court's refusal to characterize HMC's and Chapman's actions as merely
4 hapless is further supported by their collective reaction to the order to show cause.
5 The court considered separately sanctioning the response, since it clearly contains
6 inappropriate and sanctionable language, but instead chooses to view it as a part of
7 HMC's and Chapman's general approach to litigation, an approach that is
8 unacceptable under any reasonable view of modern lawyering.

9 As a result, the court discredits the testimony and arguments of HMC that
10 Chapman and HMC were innocent pawns in Rogers' sanctionable behavior with
11 respect to the Rule 2004 examination. Their conduct belies this theory. As set forth
12 above, HMC, through Chapman, filed papers that pushed to the limit Rogers' theories
13 of SSB's alleged persecution and conspiracy. They then obdurately refused to back
14 down from any position taken in the case – beginning with the argument that the
15 filing was necessary to reorganize Aston-Nevada and ending with the incendiary
16 statements contained in their response to the order to show cause. From the moment
17 they entered the case, HMC and Chapman pursued a bad-faith course of conduct,
18 employing shameful tactics to achieve improper goals.

19 **IV. HMC's and Chapman's Procedural Arguments Against Sanctions**

20 Amid the inappropriate language in their reply, HMC and Chapman make
21 several legal arguments. They argue that this court deprived itself of jurisdiction over
22 their actions when it dismissed the case subject only to SSB's sanctions motion. They
23 also claimed that the process by which the sanctions were to be determined was
24 procedurally improper, variously arguing that sanctions against them could not be
25

1 sought unless a formal complaint and adversary proceeding was initiated against
2 them, and that, in any event, there was no jurisdiction to investigate their actions.

3 A. *Lack of Jurisdiction*

4 While the order of dismissal did not expressly reserve the right for the court
5 to inquire into the conduct of HMC or Chapman, the court's order to show cause
6 impliedly, if not explicitly, kept the case open for the purpose of investigating the
7 propriety of further sanctions. *See, e.g., Troost v. Kitchin (In re Kitchin)*, 327 B.R. 337,
8 362 (Bankr. N.D. Ill. 2005) ("a potential violation of Rule 9011 is complete when the
9 paper is filed. . . . This means that sanctions may be awarded whether the plaintiff
10 wins, loses on the merits, or dismisses its own case.").²³

11 It is also well-settled that a federal trial court may retain jurisdiction after
12 dismissal of a case for the limited purpose of adjudicating Rule 11 litigation, a ruling
13 easily applicable here given that Rule 9011 is an adaptation of Rule 11.²⁴ *See Cooter*
14 *& Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *In re French Bourekas, Inc.*, 183 B.R.
15 695, 696 (Bankr. S.D.N.Y. 1995) (applying *Cooter* in a bankruptcy setting).²⁵ Moreover,

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17 ²³Indeed, even if the case were considered closed, the court retains the power to reopen it.
18 *In re Castillo*, 297 F.3d 940, 944-45 (9th Cir. 2002); *In re Elias*, 215 B.R. 600, 604 (B.A.P. 9th Cir. 1997);
11 U.S.C. § 350(b).

19 ²⁴HMC also contends that this court would violate Bankruptcy Rule 9011(c)(2)(B) by imposing
20 monetary sanctions after the case was voluntarily dismissed. The court agrees with HMC's reading
21 of the rule, but notes that the limited monetary sanctions imposed are issued under the court's
inherent power and not under Rule 9011.

22 ²⁵*French Bourekas* also contradicts HMC's contention that this sanctions proceeding is a non-
23 core matter over which this court has no jurisdiction. 183 B.R. at 696 ("[T]he power to sanction
24 parties for conduct in a core matter is itself core."). *See also Price v. Lehtinen (In re Lehtinen)*, 332 B.R.
404, 411 (B.A.P. 9th Cir. 2005) (stating in dicta that a sanction predicated on actions that occurred

(continued...)

1 the Supreme Court has stated that a federal trial court has the power to regulate
2 practice before it even in the absence of subject matter jurisdiction. *Willy v. Coastal*
3 *Corp.*, 503 U.S. 131, 137-38 (1992); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER,
4 FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1336, at 632 (3d ed. 2005).

5 HMC's and Chapman's procedural complaint – that the case was closed
6 when the first sanctions order was entered – might carry some weight if opening or
7 closing the case prejudiced their ability to defend their actions. HMC and Chapman,
8 however, were given ample opportunity to present evidence, and they did indeed
9 marshal a defense that consumed significant amounts of paper and court time. In this
10 context, the court's inherent ability to regulate practice before it permits examination
11 of their actions, and there can be no legitimate claim of prejudice or disabling
12 impropriety arising from the simple failure to formally reopen the case.²⁶

13 *B. Nature of Procedure Used to Impose Sanctions*

14 The procedure employed by the court complied with Rule 9011 and with the
15 reported decisions regarding sanctions under the inherent authority of the court. *See,*
16 *e.g., Miller v. Cardinale (In re DeVille)*, 361 F.3d 539 (9th Cir. 2004); *Polo Bldg. Group,*
17 *Inc. v. Rakita (In re Shubov)*, 253 B.R. 540, 546 (B.A.P. 9th Cir. 2000); *In re McCarthy,*
18 312 B.R. 413 (Bankr. D. Nev. 2004); FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra*,
19 at § 1337.3. The court raised its objections in writing, notified HMC and Chapman of
20 the basis for the possible imposition of sanctions, and gave HMC and Chapman the

21
22 ²⁵(...continued)
23 during a “representation of debtor in matters central to her case” was a core matter).

24 ²⁶Indeed, there was good reason for HMC to seek to reopen it so that they could comply with
25 the bankruptcy rules with respect to compensation.

1 opportunity to respond, which they did. The court also gave HMC and Chapman the
2 opportunity to present evidence, which they also did. As the court stated on the
3 record at the hearing, nothing had been decided before HMC and Chapman had a full
4 opportunity to present their case.

5 The court has also delayed deciding this matter in order to achieve a
6 thoroughly objective review of the record. The court is well aware of the consequence
7 of imposing sanctions.

8 V. The Merits

9 All of this leads to the inevitable assessment of whether HMC's and
10 Chapman's conduct violated the standards embodied in Rule 9011 or was sanctionable
11 under a proper exercise of this court's inherent power to regulate the lawyers who
12 practice before it. It is to those tasks that this opinion now turns.

13 A. *HMC's and Chapman's Violations of Rule 9011*

14 The core obligations of all who file or appear in bankruptcy court are set
15 forth in Bankruptcy Rule 9011(b)(1)-(2):

16 (b) **Representations to the Court.**

17 By presenting to the court (whether by signing, filing,
18 submitting, or later advocating) a petition, pleading, written
19 motion, or other paper, an attorney or unrepresented party is
20 certifying that to the best of the person's knowledge, information,
21 and belief, formed after an inquiry reasonable under the
22 circumstances,—

1 (1) it is not being presented for any improper purpose, such as
2 to harass or to cause unnecessary delay or needless increase in the
3 cost of litigation;

4 (2) the claims, defenses, and other legal contentions therein are
5 warranted by existing law or by a nonfrivolous argument for the
6 extension, modification, or reversal of existing law or the
7 establishment of new law;

8 In short, “[a]n attorney’s signature on a complaint is tantamount to a
9 warranty that the complaint is well grounded in fact and ‘existing law’ (or proposes
10 a good faith extension of the existing law) and that it is not filed for an improper
11 purpose.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002).²⁷ *See also*
12 *Advisory Committee’s Note to Rule 11* (as approved by the Standing Committee in
13 1993), *reprinted in* 146 F.R.D. 519, 584 (1993) (“The rule retains the principle that
14 attorneys and pro se litigants have an obligation to the court to refrain from conduct
15 that frustrates the purposes of Rule 1”); *Vairo, supra* note 27, at §§ 5.05[a][1], 10.03.

16 Under Rule 9011, the Ninth Circuit has expressed this duty as follows:

17 In determining whether sanctions are warranted under Rule
18 9011(b), we “must consider both frivolousness *and* improper
19 purpose on a sliding scale, where the more compelling the
20

21 ²⁷Although *Mattel* construed Rule 11 of the FEDERAL RULES OF CIVIL PROCEDURE, Rule 9011 is
22 based upon Rule 11, and there is sufficient identity between the two to warrant consultation of Rule
23 11 jurisprudence to interpret similar provisions of Rule 9011. *Klein v. Wilson, Elser, Moskowitz,*
24 *Edelman & Dicker (In re Highgate Equities, Ltd.)*, 279 F.3d 148, 151 (2d Cir. 2002). *See also* GEORGENE
25 M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES* § 3.04[a] (3d
ed., Richard G. Johnson, ed. 2003).

1 showing as to one element, the less decisive need be the showing
2 as to the other.”

3 Dressler v. The Seeley Co. (*In re Silberkraus*), 336 F.3d 864, 870 (9th Cir.
4 2003)(emphasis in original), *quoting* Marsch v. Marsch (*In re Marsch*), 36 F.3d 825, 830
5 (9th Cir. 1994). As the Bankruptcy Appellate Panel recently stated, “In considering
6 sanctions under Rule 9011, the court measures the attorney’s conduct ‘objectively
7 against a reasonableness standard, which consists of a competent attorney admitted
8 to practice before the involved court.’” Smyth v. City of Oakland (*In re Brooks-*
9 *Hamilton*), 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005), *quoting In re Grantham Bros.*, 922
10 F.2d 1438, 1441 (9th Cir. 1991).

11 Several actions taken by Chapman and HMC²⁸ in this case violated Rule
12 9011(b)(1) and (b)(2): opposing SSB’s relief from stay motion; later advocating the
13 inappropriate relief sought in the petition through opposing the relief from stay; and
14 later advocating the inappropriate relief through statements made in support of the
15 second motion to dismiss.

16 1. Preliminary: The Inappropriateness of Filing the Petition

17 Even though HMC and Chapman were not hired until after Aston-Nevada
18 filed, it is still important to understand the illegitimate nature of Aston-Nevada’s filing
19
20
21

22 ²⁸Although the partners of HMC other than Chapman appear to have had no actual
23 involvement before the court issued its order to show cause, it is settled law that the firm that the
24 actual violator belongs to shares responsibility with the person who committed the sanctionable
25 activity. *See* FED. R. BANKR. P. 9011(c)(1)(A); *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 548 (9th
Cir. 2004).

1 since Chapman and HMC later advocated its propriety.²⁹ In the Ninth Circuit,
2 "[f]rivolous' filings are those that are 'both baseless and made without a reasonable
3 and competent inquiry.'" *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997), *quoting*
4 *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc).
5 Aston-Nevada's filing satisfied this standard. As indicated above, Aston-Nevada had
6 no good reason to file chapter 11 bankruptcy. It was a single-asset debtor with one
7 secured creditor – SSB. It had no unsecured creditors (unless you count SSB's
8 deficiency claim). It had no employees and no revenues and no hope for either.
9 Aston-Nevada's filing was baseless. It had every hallmark of an improper filing, and
10 it had no saving grace. *See, e.g.*, *St. Paul Self Storage Ltd. P'ship v. Port Authority of*
11 *St. Paul (In re St. Paul Self Storage Ltd. P'ship)*, 185 B.R. 580, 582-83 (B.A.P. 9th Cir.
12 1995); *In re American Telecom Corp.*, 319 B.R. 857 (Bankr. N.D. Ill. 2005); *In re*
13 *McCarthy*, 312 B.R. 413, 418-19 (Bankr. D. Nev. 2004). *See also* William Thomas
14 Thurman & Brett P. Johnson, *Bankruptcy and the Bad Faith Filing*, UTAH BAR J. 12, 14-15
15 (Dec. 1997).³⁰

16
17
18 ²⁹This discussion is provided for background purposes. None of the orders previously issued
19 – including the order granting relief from stay and the order imposing sanctions on Aston-Nevada,
20 Rogers, and LeVillier – has been appealed. Neither Chapman nor HMC moved to amend the orders
21 under FED. R. BANKR. P. 9023 (incorporating FED. R. CIV. P. 59) or to set aside the order under FED.
R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60(b)). These orders are thus final and the findings
therein have issue preclusive effect in this matter.

22 ³⁰Determining the lack of good faith is not an investigation into the subjective motivation of
23 the parties. Rather, "[g]ood faith' is a term of art. 'Though it suggests that the debtor's subjective
24 intent is determinative, this is not the case. Instead, the 'good faith' filing requirement ... [is intended]
25 to deter filings that seek to achieve objectives outside the legitimate scope of the bankruptcy laws.'" *In re Liberate Technologies*, 314 B.R. 206, 211 (Bankr. N.D. Cal. 2004), *quoting Marsch*, 36 F.3d at 828.

1 As a result of such patent lack of legal justification, not much in the way of
2 improper purpose would have been necessary under either *Silberkraus* or *Marsch* to
3 sanction Aston-Nevada and its principals according to Rule 9011. But Aston-Nevada’s
4 purpose in filing was just as malign as the frivolousness that motivated it. Rogers filed
5 to avoid the consequences of the state court turnover action. Filing a bankruptcy
6 petition to evade such legitimate state court actions is a classic example of improper
7 purpose, as well as of bad faith. *In re Silberkraus*, 336 F.3d at 871; *Chinichian v.*
8 *Campolongo (In re Chinichian)*, 784 F.2d 1440, 1444-46 (9th Cir. 1986).

9 Based on this analysis, the court found in its earlier order that Rogers and
10 LeVillier filed Aston-Nevada’s petition for the sole purpose of delaying valid state
11 court proceedings. That is a highly improper purpose. *Marsch v. Marsch (In re*
12 *Marsch)*, 36 F.3d 825, 830 (9th Cir. 1994); *In re Collins*, 250 B.R. 645, 656 (Bankr. N.D.
13 Ill. 2000). Indeed, it is a textbook example of a bad-faith filing, as this court found.

14 2. The Opposition to the Relief From Stay, and “Later
15 Advocating” the Improper Purposes Set Forth in the Petition

16 What were HMC’s and Chapman’s roles or responsibilities in this sequence
17 of events? They did not sign the petition, and so one might think that they bear no
18 responsibility for it. But Rule 9011 was changed in 1997 to cover not only signing
19 documents, but also the “later advocating” of positions taken in prior documents that
20 are known not to be well-taken.³¹

21
22 ³¹At the time of the conduct discussed in this opinion, the Nevada Rules of Civil Procedure
23 did not contain the “later advocating” language, but as of January 1, 2005, Nevada changed its Rule
24 11 to incorporate this provision. Nevada Rule 11 now essentially mirrors federal Rule 11. *See*
25 *Drafter’s Note to 2004 Changes to Nevada’s Rule 11* (“The rule is amended to conform to the federal
(continued...)”)

1 A review of the events underscores that HMC and Chapman strongly
2 advocated the position inherent in Aston-Nevada's frivolous and sanctionable
3 petition. In both the response to the relief from stay motion and in the motion to
4 dismiss, HMC touted the propriety of the actions of Aston-Nevada and its
5 confederates, and it thus advocated the propriety of the initial filing. In making these
6 arguments, HMC repeatedly, knowingly, and improperly used the plural terms
7 "creditors," "debts," and "assets," although it knew, since Aston-Nevada's schedules
8 and the court's initial order were clear on this point, that there was only one creditor,
9 one debt, and one asset. Chapman and HMC could easily have checked on this by
10 obtaining a copy of the petition and schedules, either directly from Rogers or through
11 the PACER system.³² Indeed, Chapman and HMC affirmatively misled the court by
12 promising in their response to the relief from stay motion that "an exhaustive search
13 for all debts and assets is being performed and an amended petition may be
14 forthcoming." Finally, HMC joined with Rogers in suggesting a sale of the Porsche
15 by a bankruptcy trustee, but then never took any steps to have a trustee appointed.³³

16
17 ³¹(...continued)
18 rule, as amended in 1993, in its entirety.") Of course, Rule 9011 adopted the 1993 amendments in
19 1997, and so the "later advocating" language has been in effect in bankruptcy court for the last eight
20 years. See 1997 Notes of Advisory Committee on Bankruptcy Rules ("This rule is amended to
21 conform to the 1993 changes to F.R.Civ.P. 11.")

22 ³²Chapman conceded that although he had PACER access, he did not consult it before filing
23 his opposition. See *In re Oliver*, 323 B.R. 769 (Bankr. M.D. Ala. 2005) (lawyer sanctioned under Rule
24 9011 for not checking PACER before filing bankruptcy case for client that had been enjoined from
25 future filings).

³³If HMC did advise Rogers to dismiss the case after being told the facts, HMC should never
have filed an opposition to SSB's relief from stay motion. Indeed, the court entertains serious doubts
(continued...)

1 This “later advocating” of the propriety of Aston-Nevada’s chapter 11 case
2 was an abdication of professional responsibility. HMC’s and Chapman’s
3 prevarications and misstatements were deliberate and not careless. They were part
4 of a concerted effort to delay the inevitable through pettifoggery and evasion. In
5 short, their misrepresentations were designed to mislead the court. For the reasons
6 set forth above, each of them independently constitutes a violation of Rule 9011.

7 Even if HMC had not affirmatively misled the court, its conduct nonetheless
8 violated Rule 9011. In particular, when HMC learned of the meager facts related to
9 Aston-Nevada and its filing, it should have declined to file an opposition. And these
10 facts could have (and should have) either come out during the initial client
11 consultation or soon thereafter by checking PACER for Aston-Nevada’s docket
12 information. Instead, Chapman and HMC took the passive approach to client
13 representation, that of doing anything and everything the client requests, regardless
14 of its questionable nature.

15 This a lawyer may not do. Model Rule 3.1 of the American Bar Association’s
16 Model Rules of Professional Conduct states:

17 A lawyer shall not bring or defend a proceeding, or assert or
18 controvert an issue therein, unless there is a basis in law and fact
19 for doing so that is not frivolous, which includes a good faith
20

21
22 ³³(...continued)
23 as to whether any ethical law firm would have consented to represent Aston-Nevada for any purpose
24 other than dismissal. “The rule continues to require litigants to “stop-and-think” before initially
25 making legal or factual contentions.” Fed. R. Civ. P. 11 Advisory Committee’s Note (as approved
by the Standing Committee in 1993), *reprinted in* 146 F.R.D. 519, 585 (1993).

1 argument for an extension, modification or reversal of existing
2 law. . . .³⁴

3 This rule requires a lawyer to exercise independent judgment with respect to claims
4 a client wishes to bring and to decline to pursue claims that are frivolous. As
5 indicated in a leading treatise:

6 [A] lawyer’s duty to refrain from making frivolous contentions
7 will result in conflict with the client if the client insists that the
8 contentions nevertheless be made. When such conflicts arise,
9 Model Rule 3.1 and practice rules such as Rule 11 of the Federal
10 Rules of Civil Procedure dictate that the interests of the fair
11 administration of justice must be given priority over the client’s
12 desires.

13 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 27.13, at
14 p. 27-27 (3d ed. 2004). As a result, when HMC met or discussed Aston-Nevada with
15 Rogers, it should have known that filing a chapter 11 case for such a single-asset
16 debtor was frivolous, and it should have refrained from representing Aston-Nevada
17 or filing any further documents that justified Aston-Nevada’s filing. If there was any

18

19

20 ³⁴Rule 170 of the Nevada Supreme Court Rules is identical. The *Restatement of The Law*
21 *Governing Lawyers* is similar:

22 A lawyer may not bring or defend a proceeding or assert or controvert an issue
23 therein, unless there is a basis for doing so that is not frivolous, which includes a
24 good-faith argument for an extension, modification, or reversal of existing law.

25 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110(1) (2000).

1 doubt about Aston-Nevada, Chapman could have independently confirmed its status
2 on PACER. Again, to quote Hazard & Hodes:

3 If the lawyer carries out the client's instruction after becoming
4 aware of the frivolous nature of the contentions, both the lawyer
5 and the client can be civilly liable for sanctions under FRCP Rule
6 11, as well as subject to the exercise of the court's inherent
7 supervisory powers.

8 *Id.*

9 To act on such frivolous claims, then, without independent investigation,
10 was to succumb to the so-called "butler-style" of representation, under which the
11 sequaciously servile lawyer does whatever the client wants and then cites that client's
12 command as a shield to the improper actions. This style of lawyering, however, has
13 no place in bankruptcy court or, for that matter, in any court. Rule 9011(b)(2) requires
14 that "the claims, defenses, and other legal contentions therein are warranted by
15 existing law or by a nonfrivolous argument for the extension, modification, or reversal
16 of existing law or the establishment of new law." No facts existed that could have
17 made a filing by a one-asset, one-creditor, entity such as Aston-Nevada "warranted,"
18 especially when that one creditor was undersecured. There were no creditors to
19 protect, and thus no need for a collective action, and there was no equity in the one
20 asset for the debtor after the creditor's claim was paid. In such a case, all actions other
21 than seeking dismissal were part and parcel of the unlawful activity that started with
22 filing the petition.

23 This conduct runs afoul of Rule 9011. It is the *presentation* of a claim or
24 contention, whether by signing it or later advocating it, that triggers Rule 9011. *See*

1 Vairo, *supra* note 27, § 1.08[e][1][B][i], at 28-29. Under the terms of Rule 9011,
2 presentation occurs “by signing, filing, submitting, or *later advocating*[] a petition . . .”
3 BANKR. R. 9011(b)(1) (emphasis added). *See also* Vairo, *supra* note 27, §§ 4.02[d],
4 4.02[e][5]; *Buster v. Greisen*, 104 F.3d 1186, 1190 n.4 (9th Cir. 1997) (violation of Rule
5 11 to advocate in federal court the propriety of baseless statements made in state court
6 complaint that had been removed to federal court); *O’Brien v. Alexander*, 101 F.3d
7 1479, 1490 (2d Cir. 1996) (violation of Rule 11 to make misleading statements in oral
8 argument that relate directly to a particular representation contained in a prior
9 document that lawyer was then advocating).

10 Thus, even though neither HMC nor Chapman signed the petition, by later
11 advocating its propriety and legitimacy they made the requisite presentation to the
12 court. Because Aston-Nevada’s petition lacked any saving grace, this “later
13 advocating” of the propriety of Aston-Nevada’s petition in the relief from stay motion
14 and the motion to dismiss was the same as if HMC and Chapman had signed it
15 themselves. *See O’Brien*, 101 F.3d at 1490. HMC and Chapman thus violated Rule
16 9011.

17 *B. HMC’s and Chapman’s Bad Faith Behavior and the Rule 2004 Examination*

18 HMC’s conduct with respect to the Rule 2004 examination of Aston-
19 Nevada’s “person most knowledgeable” did not involve signing any pleading with
20 the court. As such, their conduct with respect to that examination does not come
21 within the ambit of Rule 9011. In short, neither HMC nor Chapman “present[ed] to
22 the court (whether by signing, filing, submitting, or later advocating) a petition,
23 pleading, written motion, or other paper” Without such a predicate act, there is
24 no violation of Rule 9011.

1 1. The Court’s Inherent Power

2 The unavailability of Rule 9011 does not mean that HMC and Chapman
3 cannot be sanctioned for their actions surrounding the Rule 2004 examination. As set
4 forth above, in the Ninth Circuit, bankruptcy courts have the inherent power to
5 punish contempts of their orders. *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539 (9th
6 Cir. 2004); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d
7 278 (9th Cir. 1996).³⁵

8 This inherent power to punish, however, differs from the power to sanction
9 under Rule 9011. Only actions taken in bad faith may be punished under the court’s
10 inherent power. *DeVille*, 361 F.3d at 548; *Brooks-Hamilton*, 329 B.R. at 287; *Fjeldsted v.*
11 *Lien (In re Fjeldsted)*, 293 B.R. 12, 26 (B.A.P. 9th Cir. 2003). *See also* *Barber v. Miller*, 146
12 F.3d 707, 711 (9th Cir. 1998) (“[a]n award of sanctions under . . . the district court’s
13 inherent authority requires a finding of recklessness or bad faith.”). By contrast, the
14 imposition of sanctions under Rule 9011 requires only a showing of “objectively
15 unreasonable conduct.” *DeVille*, 361 F.3d at 548, *quoting* *Fellheimer, Eichen &*
16 *Braverman v. Charter Technologies*, 57 F.3d 1215 (3d Cir. 1995).

17
18 ³⁵Indeed, outright contempt need not be proved. The Ninth Circuit has stated that it is:
19
20 clear that sanctions are available if the court specifically finds bad faith or conduct
21 tantamount to bad faith. Sanctions are available for a variety of types of willful
22 actions, including recklessness when combined with an additional factor such as
23 frivolousness, harassment, or an improper purpose. Therefore, we hold that an
24 attorney’s reckless misstatements of law and fact, when coupled with an improper
25 purpose, such as an attempt to influence or manipulate proceedings in one case in
order to gain tactical advantage in another case, are sanctionable under a court’s
inherent power.

Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001).

1 Further, the violations of the order must be shown by clear and convincing
2 evidence. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190-91 (9th Cir. 2003)
3 (sanctions in context of violation of automatic stay). *See also* *Hansbrough v. Birdsell*
4 (*In re Hercules Ent., Inc.*), 387 F.3d 1024, 1028 (9th Cir. 2004) (adopting *Dyer* in the
5 context of refusal to testify at Rule 2004 examination). Finally, before sanctions may
6 be imposed, those being sanctioned must have an opportunity to defend their actions.
7 *DeVille*, 361 F.3d at 548-49. That opportunity was afforded here through the briefing
8 schedule and by offering Chapman and HMC one day of court time to present any
9 relevant evidence they wished.

10 2. Subverting the Court's Rule 2004 Examination Order

11 Despite the opportunity to show otherwise, HMC and Chapman failed to
12 demonstrate that their conduct with respect to the Rule 2004 examination was
13 anything other than in bad faith. Chapman had in his possession an order requiring
14 Aston-Nevada's "person most knowledgeable" to appear for an examination under
15 Bankruptcy Rule 2004. The order set the scope of that examination broadly, indicating
16 it would extend to the following:

17 Acts, conduct or property of the debtor, or to any
18 matter which may affect the administration of the
19 debtor's estate, or to its right to discharge, and acts,
20 conduct, or property of the debtor that relate to the
21 liabilities and financial condition of the debtor, the
22 source of any money or property acquired or any
23 other matter relevant to the case.

1 The order also required production of documents “relating to the 1999
2 Porsche . . . including, but not limited to, registration papers, insurance, location,
3 etc.”³⁶

4 This order was clear and definite, especially as to the knowledge the person
5 to appear had to have; indeed, given the ownership of Aston-Nevada, the order could
6 have just as easily referred to Rogers by name. *Cf. In re Dyer*, 322 F.3d at 1190-91
7 (“The standard for finding a party in civil contempt is well settled: The moving party
8 has the burden of showing by clear and convincing evidence that the contemnors
9 violated a specific and definite order of the court. . . . In determining whether the
10 contemnor violated the stay, the focus ‘is not on the subjective beliefs or intent of the
11 contemnors in complying with the order, but whether in fact their conduct complied
12 with the order at issue.’”).

13 As Aston-Nevada had only one asset – the Porsche – and no revenue, no
14 employees, and no business plan, the only reasonable conclusion would be that the
15 person driving the Porsche and keeping it under his control – Rogers – should have
16 appeared. But he didn’t. Instead, LeVillier was sent, ostensibly because he had been
17 familiar with Aston-Nevada when it actually had assets and a purpose. But that part
18 of Aston-Nevada’s corporate life was long past, and was of no relevance to Aston-
19 Nevada’s 2004 filing. LeVillier had had no dealings with Aston-Nevada in more than
20

21 ³⁶This part of the order was technically improper, although no party objected. In 2002,
22 Bankruptcy Rule 2004 was amended by deleting the provisions permitting a court to order the
23 production of documents. In the place of a court order, Rule 2004(c) was changed to require those
24 who wish to compel the production of documents to issue or obtain a subpoena for such documents
25 in accordance with Bankruptcy Rule 9016 (which incorporates Rule 45 of the FEDERAL RULES OF CIVIL
PROCEDURE).

1 a year. LeVillier did not know where the Porsche was, and he did not bring anything
2 related to insurance or registration.³⁷

3 Chapman contends that because counsel for SSB had told him that there
4 would be no more continuances after the one that had already been granted, he went
5 forward with the examination because he believed that any opposition would be
6 futile. On that basis, Chapman and HMC contend that Chapman was justified in
7 showing up with whomever the client designated and proceeding with the
8 examination. This is a complete abdication of Chapman's and HMC's responsibilities
9 as attorneys and constitutes further evidence of their bad faith. "Following orders"
10 of a client or a superior or employer is no defense to filing a pleading in bad faith or
11 for an improper purpose. *See, e.g.,* NCNB Texas Nat'l Bank v. A.S.M., Inc. (*In re*
12 *A.S.M., Inc.*), 110 B.R. 802, 806 (Bankr. W.D. Tex. 1990) ("Counsel is not immune
13 merely because he or she was following the client's instructions."); *In re* Chicago
14 *Midwest Donut, Inc.*, 82 B.R. 943 (Bankr. N.D. Ill. 1988).

15 Professionally responsible attorneys would not have allowed their client to
16 continue to involve them in a scheme to frustrate SSB. At a minimum, HMC and
17 Chapman should have told Aston-Nevada that HMC and Chapman were not
18 prepared to go forward under those conditions and that Aston-Nevada's decision to
19 send LeVillier was unacceptable. They should have then halted the examination, and
20 tried to defend Aston-Nevada or, if Aston-Nevada's actions were indefensible, they
21 should have moved to withdraw from the representation.

22
23
24 ³⁷The testimony is reprinted above in note 14.
25

1 Instead of taking this position, they compounded their error by going
2 forward with the examination. They then continued to attempt to justify their actions
3 long after their insufficiency was shown. Again, since Aston-Nevada had virtually no
4 assets or operations (and since HMC had recognized this in its motion to dismiss), and
5 since LeVillier had no familiarity with that one asset, the dissembling inherent in
6 proffering and defending LeVillier as the “person most knowledgeable” for Aston-
7 Nevada is apparent.

8 As indicated above, HMC should have insisted that Rogers appear or sought
9 a second continuance when Rogers failed to appear at the continued examination. To
10 permit Aston-Nevada to proffer LeVillier as the “person most knowledgeable” was
11 to actively flout a specific court order under circumstances in which HMC should
12 have, and undoubtedly did, know better.³⁸ Indeed, if the law firm didn’t know better,
13 it has no business practicing law. *Cf. Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d
14 644, 648 (9th Cir. 1997) (“a finding of bad faith is warranted where an attorney
15 ‘knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for
16 the purpose of harassing an opponent’”).

17 _____
18 ³⁸HMC argued that the Rule 2004 order was indefinite. The following excerpt from their brief
19 in opposition to sanctions shows the vacuity of their argument:

20 The biggest complaint that Silver State makes in their Motion for Sanctions with
21 regard to the 2004 Examination is that LeVillier did not know the exact location of the
22 “moving” vehicle. Not to mince words, but that really is impossible, as it is a moving
23 item.

24 The order did not require knowledge of the Porsche’s location with the precision of a global
25 positioning system. Putting forward this argument – which shares more in common with
Heisenberg’s uncertainty principle than a cognizable sanctions defense – further illustrates the bad
faith conduct of HMC.

1 Nevada had filed for a proper purpose, and by defending Aston-Nevada, Rogers, and
2 LeVillier with respect to SSB’s sanctions motion. HMC and Chapman also violated
3 Rule 9011 by making affirmative misrepresentations in the opposition to SSB’s motion
4 for relief from stay and in the response to SSB’s motions for sanctions.³⁹ Finally, HMC
5 and Chapman also flouted in bad faith this court’s order regarding the Rule 2004
6 examination, and this court’s inherent power allows it to sanction that conduct.

7 A. *Monetary Sanctions Against HMC and Chapman*

8 The court acknowledges that, given the procedural context of this matter,
9 monetary sanctions are not appropriate under Rule 9011. That rule does not permit
10 fee shifting of the cost of litigation, *Chase v. Kosmala (In re Loyd)*, 304 B.R. 372, 374
11 (B.A.P. 9th Cir. 2005), and Rule 9011(c)(2)(B) specifically limits the court’s ability to
12 enter sanctions if a dismissal has been entered.

13 But nonpunitive monetary sanctions may be awarded under the court’s
14 inherent power to regulate practice before it. *Cf. Miller v. Cardinale (In re DeVille)*,
15 361 F.3d 539, 553 n.9 (9th Cir. 2004) (sanctions under inherent power may be aimed at
16 deterrence without necessity of invoking strict procedural protections afforded by a
17 criminal contempt proceeding); *Price v. Lehtinen (In re Lehtinen)*, 332 B.R. 404, 412
18 (B.A.P. 9th Cir. 2005) (noting that the inherent power of the court permits monetary
19 sanctions when award would be “either compensatory or . . . designed to coerce
20 compliance”). In this context the principles guiding the formulation of sanctions

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22 ³⁹In their response to the motion for sanctions, HMC continued to press Rogers’ conspiracy
23 theory as justification for the filing, citing an article in a local paper regarding the repossession as
24 proof that SSB had a vendetta against Rogers (although no proof of anything other than the article’s
25 existence was offered). It again stated the purpose in filing was to bring in a neutral trustee,
although as indicated in text, HMC never made any request for a chapter 11 trustee.

1 should be the same as for Rule 9011: sanctions should be “limited to what is sufficient
2 to deter repetition of such conduct or comparable conduct by others similarly
3 situated.” FED. R. BANKR. P. 9011(b)(2). See *Knupfer v. Lindblade (In re Dyer)*, 322 F.
4 3d 1178, 1193-94 (9th Cir. 2003) (noting that the “inherent sanction authority allows a
5 bankruptcy to deter and provide compensation for a broad range of improper
6 litigation tactics”).

7 In determining the proper sanction, the court acknowledges that it
8 previously ordered \$12,108.50 in sanctions to be paid to SSB. This amount represented
9 SSB’s attorneys’ fees in *Aston-Nevada’s* case. As the Ninth Circuit has said:

10 A restitutionary award compensating the opposing party for
11 unnecessary litigation expenses – as opposed to a punitive fine
12 paid to the court – is a particularly appropriate sanction in cases
13 involving manipulative petitions filed principally for purposes of
14 delay and harassment.

15 *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 831 (9th Cir. 1994).

16 As this court earlier found, disobeying the court’s order for examination of
17 the “person most knowledgeable” under Rule 2004 caused SSB to incur excess fees
18 and costs. SSB’s costs and attorneys’ fees related to much of the chapter 11 filing were
19 therefore completely avoidable. HMC and Chapman should thus be jointly and
20 severally liable with their former clients for that portion of SSB’s attorneys’ fees caused
21 by Chapman’s and HMC’s actions in defending the Rule 2004 examination and for
22 their actions that led to SSB’s sanctions motion. That amount is \$9,640.⁴⁰ It is fitting

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24 ⁴⁰This total is taken from HMC’s opposition to SSB’s original sanctions motion, filed
25 (continued...)

1 that Chapman and HMC share in the obligation to compensate SSB for their client's
2 bad faith actions. This sanction should assist the court in deterring future similar
3 misconduct by other firms.⁴¹

4 B. *Additional Sanctions Against HMC and Chapman*

5 1. Nonmonetary Sanctions

6 Should there be additional sanctions? Again, Rule 9011 states that "[a]
7 sanction imposed for violation of this rule shall be limited to what is sufficient to deter
8 repetition of such conduct or comparable conduct by others similarly situated." FED.
9 R. BANKR. P. 9011(c)(2). Similarly, actions sanctionable under the court's inherent
10 powers work best when they compensate the harm caused or deter repetition of the
11 sanctionable conduct. *In re Dyer*, 322 F.3d at 1190-91; *Gregory v. Depte*, 896 F.2d 31,
12 34-35 (3d Cir. 1990).

13 Although the court has found HMC and Chapman to be jointly and severally
14 liable for some of SSB's fees and costs under the analysis above, this may not be a
15 sufficient deterrent to them or to others similarly situated, especially if HMC's clients
16 have already paid SSB. As noted recently:

17 Apparently, the existence of Rule 9011 alone has not had much of
18 a deterrent effect for general and nonbankruptcy practitioners,
19 some of whom apparently hold an all-too-widespread belief that
20 a bankruptcy case is a panacea for state court litigation that has

22 ⁴⁰(...continued)
23 November 24, 2004.

24 ⁴¹If the sanctions have already been paid, no further payment is required. The court expresses
25 no opinion on any contribution or equitable indemnity actions among those liable for the sanctions.

1 account HMC's written response to this court's order to show cause, which HMC cast
2 in splenetic and threatening terms. From this, the court concludes that HMC's
3 attorneys care more about the mercantile qualities of the practice of law than they do
4 about their professional obligations to their clients, to the public, and to the courts.⁴⁴

5 Against this background, the character of the violations is troubling,
6 especially for other firms that may be tempted to act as HMC and Chapman have
7 acted in this case. HMC, through Chapman, took steps no law firm should take and
8 scoffed at rules in a spirit of gamesmanship that is inappropriate for an officer of this
9 court. The notion that any action requested by a client should be taken so long as
10 some argument, no matter how tenuous, can be made for it, has a corrosive effect. If
11 unchecked, it spreads in the form of "tit-for-tat" reciprocity that lowers the level of
12 practice, and multiplies litigation needlessly.

13 Thus, in addition to the monetary sanctions set forth above, the court will
14 order three forms of nonmonetary sanctions:

- 15 ● First, HMC and Chapman will receive a public reprimand in the form
16 of the publication of this opinion in West's BANKRUPTCYREPORTER and
17 in other collections of bankruptcy court opinions. See ABA

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19
20 ⁴³(...continued)
21 the aggravating factor of its inappropriate written response to this court's order to show cause.
22 Several times in its response, and during the hearing on June 17, HMC and Chapman contended that
23 they did nothing wrong. Indeed, throughout this process they have consistently maintained that
their representation of Aston-Nevada deserved commendation, not condemnation.

24 ⁴⁴At the June 2005 hearing, Kurt Harris indicated that HMC had been more careful in their
25 client intake due to this case, but then lamented that this move had hurt HMC's cash flow.

1 STANDARDS, *supra*, at § 4.53; William W. Schwarzer, *Sanctions Under*
2 *the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181, 201 (1985).

- 3 ● Second, to the extent that any credit can be given to HMC's and
4 Chapman's testimony that the errors made were a result of youth and
5 inexperience, such errors must not be repeated. Since the attitudes
6 represented by Chapman's work appear to pervade the ethos of
7 HMC, as shown by its response to the order to show cause, the court
8 will order that no attorney associated with HMC as of the date of the
9 order to show cause may make any appearance or file any document
10 with the Bankruptcy Court for the District of Nevada unless that
11 attorney first: (i) files a declaration stating that, during the twenty-
12 four months immediately preceding the desired filing or appearance,
13 the person has: (A) taken eight hours of continuing legal education
14 regarding the practice of bankruptcy; (B) taken at least four hours of
15 continuing legal education regarding ethics or professional
16 responsibility; *and* (ii) attaches to the declaration, for filing in the case
17 in which the person desires to appear, (A) a copy of this opinion; and
18 (B) a copy of the brochure or other similar writing indicating the scope
19 of the continuing legal education program attended. *See* ABA
20 STANDARDS, *supra*, at § 2.8. This restriction will last for five years from
21 the date of entry of this opinion, and it will be automatically renewed
22 for another five years from that date unless HMC or Chapman file
23 papers requesting to be relieved of the restriction that demonstrate
24 why the restriction should be lifted.

- 1 ● Finally, the court notes from reading HMC's correspondence
2 submitted as part of the record that HMC maintains a website that
3 lists various areas of expertise (www.702law.com). Given all that has
4 been discussed in this opinion, it is this court's finding that
5 bankruptcy is not among the areas of expertise of HMC or Chapman,
6 and it should not be an area of advertised practice until HMC's
7 attorneys, including Chapman, obtain more training. As a result, it is
8 this court's order that HMC may not list bankruptcy as a specialty or
9 as an area of practice on its website or in other promotional material
10 unless and until at least one partner of the firm meets the continuing
11 education requirements set forth in the immediately preceding
12 paragraph. See ABA STANDARDS, *supra* at § 4.52, & commentary
13 thereto.

14 It is the court's judgment that a sufficient deterrent can be achieved only by
15 combining these multiple forms of sanction – the liability for SSB's fees, the
16 reprimand, the instruction of HMC's attorneys as to what conduct to avoid, and the
17 limitation on false advertising. See, e.g., *Barnett Bank of Tampa, N.A. v. Muscatell (In*
18 *re Muscatell)*, 116 B.R. 295 (Bankr. M.D. Fla. 1990); *Vairo, supra* note 27, at 573-74.

19 2. Further Proceedings

20 This court has the power to regulate the fees charged by attorneys who work
21 for the bankruptcy estate. 11 U.S.C. § 329(a). Various rules and procedures govern
22 this relationship. See, e.g., FED. R. BANKR. P. 2014-2016. As far as the court can tell,
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1 however, HMC complied with none of these rules.⁴⁵ HMC never filed a Rule 2016
2 statement or an application for employment, even after it was explicitly warned that
3 it had a duty to do so. Given the facts recited above, this court finds that this conduct
4 is not benign, and the court further finds that it is part and parcel of the bad faith with
5 which HMC and Chapman pursued Aston-Nevada's case.

6 Failure to comply with these rules, however, does carry other consequences.
7 Bankruptcy courts have the power to require disgorgement of all fees paid by or for
8 the debtor if the mandatory disclosures are not made. 11 U.S.C. § 329. "The
9 disclosure requirements imposed by § 329 are mandatory, not permissive, and an
10 attorney who fails to comply with the disclosure requirements forfeits any right to
11 receive compensation." *Peugeot v. United States Trustee (In re Crayton)*, 192 B.R. 970,
12 976-81 (B.A.P. 9th Cir. 1996). *See also Half v. United States Trustee (In re Basham)*, 208
13 B.R. 926, 931 (B.A.P. 9th Cir. 1997).

14 In its order to show cause, the court put HMC on notice of these provisions
15 and their mandatory nature. HMC has chosen to ignore them. HMC did, however,
16 disclose that HMC received \$2,384.87 from Rogers for representing Aston-Nevada.
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19 ⁴⁵In the order to show cause, the court separately required HMC to disclose the source of its
20 fees for representing Aston-Nevada. In its responsive submission, HMC (through Kurt Harris)
21 objected to disclosing fees received from Rogers, stating, "I believe the disclosure to violate attorney-
22 client confidentiality taught to me in law school." No authority other than law school training was
23 cited. Regardless of what Harris recalls from law school, the courts and Congress have consistently
24 held that disclosure of such compensation not only is consistent with the rules of attorney-client
25 relationships, but is mandatory. *See United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997) (identity
of bankruptcy client, amount of fee and general purpose of work not subject to attorney-client
privilege); *United States v. White*, 950 F.2d 426 (7th Cir. 1991) (information given to lawyer for use
in schedules not privileged); 11 U.S.C. § 329(a).

1 It alleges that it is owed much more. Nevertheless, *Crayton* and *Basham* compel
2 disgorgement of those fees.

3 It would appear, however, that any disgorgement of fees would,
4 paradoxically, create property of Aston-Nevada's estate. But as Aston-Nevada had
5 no property other than the over-encumbered Porsche, returning the fees to Aston-
6 Nevada would serve no useful purpose; as SSB has obtained the Porsche and an
7 award of sanctions, there are no creditors. Disgorgement to the debtor would
8 effectively force HMC to pay Rogers (the ultimate owner of Aston-Nevada). This
9 would in turn have the effect of unduly and improperly compensating Rogers, whose
10 conduct was previously sanctioned by this court, and would actively frustrate the
11 previous sanctions imposed on him by this court.

12 But HMC cannot retain the funds without complying with the Bankruptcy
13 Code and Rules, especially after they have been given warnings and opportunities to
14 comply, and then have refused to do so. Thus, the court orders the immediate
15 disgorgement of all fees received to represent Aston-Nevada into this court's registry.
16 As an alternative, with the prior approval of the court, HMC may pay the amount of
17 the fees to any recognized program providing legal services to people who could not
18 otherwise afford them, such as Clark County Legal Services or Nevada Legal Services.

19 VII. Conclusion

20 HMC and Chapman, who had no background or training in chapter 11,
21 agreed to represent a client who had no business being in bankruptcy. They
22 compounded their error by knowingly and in bad faith advocating that client's
23 untenable position, by flouting an order of this court for the examination of the debtor,
24 and by refusing to adhere to the rules regarding representation of bankruptcy estates.

1 For this they will be sanctioned as set forth above with a combination of public
2 reprimands, admonishments, and educational requirements.

3 This court is saddened by the necessity of this action. Indeed, the fact that
4 more than a year has passed between the acts complained about and this decision is
5 evidence of the difficulties inherent in determining the proper response to HMC's and
6 Chapman's actions, and in fashioning sanctions that are not punitive. The court hopes
7 that these sanctions will lead to compliance with the rules of this court, the
8 Bankruptcy Code, and the legal profession.

9 Ethical and professional representation of clients is essential to the ideals
10 contained within our legal system. When lawyers cross the lines set by Rule 9011 and
11 by other guidelines, their actions must be addressed, and addressed in a manner that
12 will, in the words of Bankruptcy Rule 9011, "deter repetition of such conduct or
13 comparable conduct by others similarly situated." That has been the goal in crafting
14 the sanctions set forth in this opinion.

15 This opinion will constitute the court's findings of fact and conclusions of
16 law under FED. R. BANKR. P. 7052. A separate order finding HMC jointly and severally
17 liable for the amount of the sanctions set forth above, and imposing the nonmonetary
18 sanctions also set forth above, will be entered under FED. R. BANKR. P. 9021.

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